SERVED: February 10, 1994

NTSB Order No. EA-4071

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTA TION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of January, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. DONALD WILSON, Respondent.	)	Docket SE-11726

OPINION AND ORDER

The respondent, pro se, has appealed from the oral initial decision and order of Administrative Law Judge Patrick G. Geraghty, issued on March 2, 1992, at the conclusion of an evidentiary hearing. [1] By that decision, the law judge affirmed the Administrator's order revoking respondent's airline transport pilot, flight instructor, and medical certificates pursuant to

[1]An excerpt from the hearing transcript containing the initial decision and order is attached.

the provisions of Section 609(c) of the Federal Aviation Act of 1958, 49 U.S.C. App. § 1429(c), [2] as a result of respondent's conviction of Federal law relating to a controlled substance, and involving the use of an aircraft.

According to the record, on February 2, 1990, respondent was convicted of violations of Title 23 U.S.C. §§ 963 and 846 (conspiracy to import and conspiracy to possess with intent to distribute at least 1,000 pounds of marijuana) and Title 18 U.S.C. § 1952 (interstate travel to promote unlawful activity). On October 1, 1990, the Administrator issued the order of revocation which is the subject of this proceeding. Respondent appealed that order, and the matter was assigned to ALJ Geraghty. A hearing was subsequently scheduled to take place at the U.S. penitentiary where respondent was incarcerated.

On January 23, 1992, an attorney wrote to the law judge on respondent's behalf. In the letter, the attorney requested that the hearing be postponed until respondent's release from prison,

---

[2]On January 24, 1985, the date of respondent's offenses, § 609(c) of the Act provided in pertinent part as follows:

> (c)(1) The Administrator shall issue an order revoking the airman certificates of any person upon conviction of such person of a crime punishable by death or imprisonment for a term exceeding one year under a State or Federal law relating to a controlled substance (other than a law relating to simple possession of a controlled substance), if the Administrator determines that (A) an aircraft was used in the commission of the offense or to facilitate the commission of the offense, and (B) such person served as an airman, or was on board such aircraft, in connection with the commission of the offense. The Administrator shall have no authority to review the issue of whether an airman violated a State or Federal law relating to a controlled substance.

because, among other reasons, the Bureau of Prison policy apparently would prevent certain of respondent's witnesses, who possessed prior criminal records, from entering the prison to testify on his behalf. The attorney indicated that it was respondent's intent to contest the validity of his conviction at the hearing.

On January 30, 1992, the law judge issued an order denying the request for a postponement. The law judge indicated in his order that it was not clear from the attorney's letter whether the attorney had been retained by respondent as counsel for this proceeding. The law judge nevertheless sent a copy of the order and a hearing notice to the attorney, indicating that the hearing had been scheduled for March 2, 1992.

On February 13, 1992, respondent, still pro se, filed a motion asking the law judge to issue subpoenas for his witnesses, and to authorize and provide for their travel expenses, or in the alternative, that the hearing be postponed until respondent was released from custody. [3] Respondent asserted in his motion that the testimony of his witnesses would show "that there is no proof that I was in fact at the Union Airport on the dates in question, contrary to the testimony of the government's witnesses at my trial...." The law judge issued a subpoena for one of the named witnesses, also named by the Administrator. As to the remaining witnesses, the law judge denied the request for subpoenas, noting

[3]Respondent indicated that his release was imminent, although he did not specify a date.

that respondent's intent to re-litigate the validity of his conviction indicated his continued misunderstanding as to the nature of FAA enforcement proceedings. See Order dated February 26, 1992.

The hearing was held on March 2, 1992, as scheduled. The Administrator presented documentary evidence which established respondent's felony conviction of federal laws relating to controlled substances. In addition the Administrator presented the testimony of a special agent with the Drug Enforcement Administration who testified that during the course of his investigation into the conspiracy he determined that respondent used a private aircraft in the conduct of this illegal activity. (TR-21). The agent also sponsored evidence establishing that respondent received a sentence of 10 years imprisonment. [4]

Respondent attended the hearing, but he refused to participate, stating repeatedly that he did not want to proceed without the presence of his attorney. The law judge advised respondent that he had spoken with an assistant from that attorney's office and she had indicated that the attorney was not representing respondent in this enforcement action. The assistant explained that the attorney had represented respondent

[4]The Administrator also placed into evidence respondent's airman file, Administrator's Exhibit C-3, which shows that on March 7, 1984, respondent's certificates were revoked for operating an aircraft within the United States with knowledge that marijuana was carried in the aircraft and for fraudulently concealing that conviction on an application for a medical certificate. Respondent's certificates were also suspended for 45 days in 1983 for other violations of the FAR.

in the past, and was merely attempting to assist him in this matter.[5] Respondent stated on the record that he had been informed that the attorney would be present, but the attorney did not appear.[6] The law judge proceeded with the hearing. Respondent offered no evidence, and the law judge affirmed the Administrator's order in its entirety.

Respondent raises numerous issues on appeal, none of which, in the Board's view, have merit.[7] His pleadings clearly evidence his misunderstanding of the nature of these proceedings. Section 609(c) of the Federal Aviation Act mandates revocation of airman certificates because of drug-related convictions involving the use of aircraft. Administrator v. Olsen and Nelson, NTSB Order No. EA-3949 at 6 (1993), and cases cited therein. Moreover, the plain language of the statute ("The Administrator shall have no authority to review the issue of whether an airman violated a State or Federal law relating to a controlled substance"), makes

[5]The law judge's memorandum of this conversation is contained in the Board's file. The memorandum, dated March 16, 1992, was apparently misdated or made subsequent to the conversation.

[6]The law judge recessed once at the hearing so that the warden could check to see if the attorney was waiting at the admissions desk. The law judge again offered a recess when respondent indicated that his papers were in the prison law library, but respondent declined the opportunity to obtain them and proceed with his case without counsel.

[7]The Administrator has filed a brief in reply. In what appears to be a response to the Administrator's reply brief, respondent raised several other issues. Section 821.48(e) of the Board's Rules of Practice, 49 C.F.R. § 821.48(e) provides that no further briefs may be filed except upon a showing of good cause. There being no showing of good cause, the pleading will not be considered.

it clear that the issue of whether the convictions are valid will not be re-litigated before the Board. [8] Thus, the fact that respondent was unable to present his witnesses because they could not be admitted to the prison does not constitute a denial of due process, as their testimony was irrelevant and would not have affected the outcome of the proceeding. [9] See also Administrator v. Rawlins, 5 NTSB 2036 (1987), aff'd, 837 F.2d 1327 (5th Cir. 1988).

As to his lack of legal representation at the hearing, there is no evidence that an attorney had been retained to represent respondent in these proceedings. The attorney who respondent contends had agreed to represent him effectively denied any such agreement in his letter to the law judge and through his assistant, in her telephone conversation with the law judge. Moreover, while the attorney was served, and acknowledged receipt of, a copy of the hearing notice, the attorney never filed a notice of appearance with the Board or took any steps consistent

[8] In the event the convictions were overturned on appeal, respondent could seek relief under the statute.

[9] Respondent contends that he could not have been an airman on this aircraft because another individual was the pilot-in-command of the subject flight(s). The statute does not limit certificate action against only the pilot-in-command, but mandates revocation of the airman certificates of any person who served as an airman, or was on board such aircraft, in connection with such activity or the facilitation of such activity. Nor is there any requirement in the statute that the individual actually hold an airman certificate at the time of the offense. Thus, respondent's claim that he is immune from this FAA enforcement action because he did not hold an airman certificate at the time of these offenses, since his certificate had already been revoked by the FAA in 1984 for similar conduct, is without merit.

with respondent's assertion that he planned to appear at the hearing or otherwise represent respondent in this matter. In these circumstances, it would appear that respondent, despite ample notice and opportunity to retain counsel, failed to do so. We conclude, based on the foregoing, that the law judge did not abuse his discretion by going forward with these proceedings, and that the evidence supports affirmation of the Administrator's order.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's order of revocation is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order. Chairman VOGT submitted the following concurring statement.

Chairman Vogt's Concurrence in Administrator v. Wilson Notion 6216

To establish a violation of § 609(c)(1) the Administrator had to prove not only that respondent: (A) was convicted under a controlled substance law of a crime punishable by death or imprisonment for a term exceeding one year, but also that respondent (B) used an aircraft in facilitating the crime, and (C) served as an airman or was onboard the aircraft in connection with the crime. The Administrator met this burden in part, through testimony that respondent used a private aircraft in the conduct of the illegal activity. To rebut this evidence, respondent had the right to present testimony from the witnesses he sought to subpoena. Although it was within the law judge's discretion see 49 CFR 821.20(a), I would find that under these circumstances, he abused his discretion in not issuing the subpoenas. However, respondent refused to participate in the hearing and made no record that he would have called the witnesses to testify had they been subpoenaed. Thus, the error in refusing to subpoena the witnesses was harmless.

C.W.V.